SUPERIOR COURT
OF THE
STATE OF DELAWARE

WILLIAM C. CARPENTER, JR.
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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January 30, 2007

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RE: State of Delaware v. Felix Carrea, Thomas Carrafa, Peter Carrea and Haks Lex Pac, Inc.
ID Nos. 0211005775, 0211005782, 0211003661 and 0211005796

Submitted: October 23, 2006
Decided: January 30, 2007

On the State's Motion for Reargument. **DENIED**.

Dear Counsel:

The State of Delaware has filed a motion pursuant to Superior Court Civil Rule 59(c) and Superior Court Criminal Rule 57(d) seeking reargument of the dismissal of the indictment against Thomas Carrafa, Felix Carrea, Peter Carrea and Haks Lex-Pac, Inc. (collectively, the "Defendants") by this Court (the "Motion"). After reviewing the parties' submissions, the Motion is denied.

Background

On or about November 18, 2002, Thomas Carrafa, Felix Carrea and Peter Carrea were indicted by a grand jury for failing to have an adult entertainment license pursuant to 24 Del. C. § 1606 and Conspiracy Third Degree pursuant to 11 Del. C. § 511. At that same time, the Defendant's company Haks Lex-Pac, Inc. was also indicted for Failure to Have an Adult Entertainment License. Pursuant to these indictments, a combined jury trial commenced on September 19, 2006.

On September 22, 2006, the fourth day of trial, just prior to the State resting its case, the State alerted the Court of its desire to amend the indictments to include a *mens rea* of "intentionally, recklessly or knowingly" pursuant to 11 Del. C. § 251[1] with respect to the failure to have a license offense. Since this was a new development only decided by the State the night before, the Court then took a break to allow the parties some time to reflect upon the State's request. Subsequently, the State retracted its request by concluding that a state of mind need not be placed in the indictment since it was not within the statutory language of the violation charged.[2] In turn, the State requested that the *mens rea* requirement simply be placed within the jury instructions.[3] The Defendants then moved to have the indictment dismissed due to a faulty grand jury process which resulted in a defective indictment, arguing they were prejudiced since they were not on notice of a *mens rea* as the State had indicted the offense under the theory of strict liability.[4]

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[1] 11 Del. C. § 251 indicates:
(a) No person may be found guilty of a criminal offense without proof that the person had the state of mind required by the law defining the offense or by subsection (b) of this section.
(b) When the state of mind sufficient to establish an element of an offense is not prescribed by law, that element is established if a person acts intentionally, knowingly or recklessly.

[2] Trial Tr. Vol. 4, 43, Sept. 22, 2006.

[3] *Id.*

[4] *Id.* at 44-45.

At this juncture during the trial, the Court had to assess whether the indictment needed to be amended, and if so, whether it was proper to do so after four days of trial. The Court accepted the State's representation that the statute required a *mens rea,* and was even advised that trial counsel had been specifically directed by the State's appeal unit that a *mens rea* needed to be established. The Court found that amending the indictment at such a late time in the trial, or even including it in the jury instructions, would prejudice the Defendants, and the Court dismissed the charges over the State's objection, and pursuant to the Defendant's motion. In the Court's oral ruling, the following occurred:

> THE COURT: Once the State concedes - and I have to say it on their behalf that they have, in good faith and in the best of conscious, has, in essence, now have said it would be difficult for them to argue that the *mens rea* element is not part of what is required for a conviction. Once you make that concession, and it's not included in the indictment or the charge, you have a defective indictment, because *mens rea* is not simply form, it's not simply surplusage; it's essential to the charge. And, so, if Title 24 statute, the one we're questioning here, requires the defendant[s] to have either a knowing, intentional, or reckless state of mind, that state of mind - notice of that state of mind has to be included in some fashion, and for one - for two reasons:
>
> One, if a Grand Jury is sought, the presentation to the Grand Jury must have allowed them to be able to decide whether or not the defendants intentionally, recklessly, or knowingly operated the establishment without the necessity of a license requirement. And as best I can tell, since the indictment is moot to this, that that element would have not been provided to the Grand Jury to decide. Second of all, the change must put the defendant[s] on notice so that he[they] has an opportunity to prepare a defense for it.
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> So, the Court finds that the *mens rea* addition that is now sought by the State is not simply form, which would allow the State to be able to amend it at their will; it is a matter of substance.
>
> And even more critical to the Court's decision is the recognition that this *mens rea* requirement that's now been recognized by counsel creates a

> different charge. This is not what the charge was that's in the indictment. It's a different element. And I cannot say, in good conscience, that the defense would not have defended the matter in a different way if the *mens rea* had been a part of the indictment.
>
> So, when I consider that together, the defense motion to dismiss the charges will be granted, as the indictment is defective. . . .[5]

Thereafter, the State filed this motion for reargument, to which the Defendants have responded.

Discussion

A motion for reargument provides the trial court an opportunity to correct any mistakes prior to an appeal.[6] To prevail on a motion for reargument, the proponent must show the Court has "overlooked a controlling precedent or legal principles, or [that] the Court has misapprehended the law or facts such as would affect the outcome of the decision."[7] In the case *sub judice*, the State has not shown that the Court made such mistakes in dismissing the indictment.

Pursuant to Superior Court Criminal Rule 7(c), an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."[8] An indictment is a device used to "acquaint the defendant with the offense

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[5] *Id.* at 55-58.

[6] *Kovach v. Brandywine Innkeepers Ltd. P'ship.,* 2001 WL 1198944 (Del. Super. Ct.), at *1 (citing *Hessler v. Farrell*, 260 A.2d 701, 702 (Del. 1969)); *Beatty v. Smedley*, 2003 WL 23353491, at *2 (Del. Super. Ct.); *Gass v. Truax*, 2002 WL 1426837, at *1 (Del. Super. Ct.).

[7] *Id.*; see also, *Murphy v. State Farm Ins. Co.*, 1997 WL 528252 (Del. Super. Ct.); *Beatty*, 2003 WL 23353491, at *2 ("[A motion for reargument] will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.") (citation omitted).

[8] Super. Ct. Crim. R. 7; See also, *Pepe v. State*, 171 A.2d 216, 218 (Del. 1961) (An indictment must be sufficiently drafted as to provide the defendant with the complete charge against him to allow him the reasonable opportunity to prepare his defense.).

charged sufficiently to enable him to prepare his defense. . . ."[9] Generally, indictments which track the language of the statute are adequate, but this is only so if it satisfies all the requirements under Rule 7.[10] While indictments must be carefully drafted, the court will not dismiss an indictment due to technical errors or defects which do not prejudice the defendant's rights.[11] Should the indictment require amending, the court may only amend as to form, not substance, to ensure the grand jury process is protected.[12]

Here, the Defendants moved to have the indictment dismissed since it failed to provide the Defendants notice of each essential element of the offense charged, namely the *mens rea*, and they were prejudiced in how they had or would have prepared to defend the case. The State had progressed through four days of trial believing the statute relating to operating an adult entertainment establishment without a license was a strictly liable statute requiring no particular mental state.[13]

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[9]*State v. Blendt*, 120 A.2d 321, 323 (Del. Super. Ct. 1956); *Minnick v. State*, 261 A.2d 93, 96 (Del. Super. Ct. 1960); *State v. Lasby*, 174 A.2d 323, 324 (Del. Super. Ct. 1961).

[10]*State v. Deedon*, 189 A.2d 660 (1963); *Minnick*, 168 A.2d 93; *State v. Martin*, 163 A.2d 256, 257 (Del. Super. Ct. 1960) ("An indictment for a statutory offense is generally held to be sufficient when the offense is charged substantially in the language of the statute unless the statute itself fails clearly to set forth all the elements necessary to constitute the offense.") (citing *State v. Allen*, 112 A.2d 40 (Super Ct. Del. 1955)).

[11]*Blendt*, 120 A.2d at 323 ("The spirit of our new Criminal Rules prohibits 'fine combing' of an indictment for formal and technical defects.")

[12]*Johnson v. State*, 711 A.2d 18, 26 (Del. 1998).

[13]Ms. Knoll: Your Honor, the first issue, and what I assume is probably the biggest issue, is, when I was reading your Honor's jury instructions, my thinking was that, if there was a *mens rea* required for the corporation, didn't it likely mean that there's a *mens rea* required for the defendants? I had always acted under the assumption that it was a strict liability statute. . . and it's not a strict liability statute. . . .
Trial Tr. Vol. 4, 3, Sept. 22, 2006.

Ms. Knoll: I think it has to be put in - if your Honor reads the code, for Title 11, the assumption is intentionally, recklessly or knowingly, all three. It says it doesn't apply to other codes, if there are violations, or if that particular code is a strict liability code. I thought Title 24 was a strict liability code. In fact, I sort of still think that [sic] way. . . .
Trial Tr. Vol. 4, 4, Sept. 22, 2006.

As the trial was nearing conclusion, the State's theory shifted and the State wanted to add an element of "knowingly, intentionally or recklessly" to the offense by placing language to that effect within the jury instructions. The State argues that the Defendants were not prejudiced by this revelation since establishing a *mens rea* of intentionally, knowingly or recklessly places a greater burden on the State. While this is true, it does not address the issue of a defendant's ability to develop a strategy to counter the *mens rea*, nor the Defendant's opportunity to cross-examine the State's witnesses regarding this mental state.[14] Thus, despite the State seeking a higher burden, the changed *mens rea* left the Defendants unprepared to defend themselves. Clearly, if the Defendants believed the statute required a *mens rea,* they could have developed a defense attacking whether they had the required mental state. By the State's omission, they were prohibited from doing so. And while the State's argument is correct that, in certain circumstances, a jury may find a *mens rea* which is not placed in the indictment, that is only the case if the defendant is effectively on notice of the state of mind element.[15] That is not the scenario before this Court.

The purpose of an indictment is to provide a defendant notice of each element of the charge he must defend, and as indicated above, that did not occur here. The indictment did not adequately alert the Defendants of the state of mind requirement of the offense, and thus it would have been prejudicial to allow the State to continue its prosecution with a late inning adjustment which dramatically changed the field of play. In addition, since adding intentionally, knowingly or recklessly to the statute creates a different burden which the grand jury would have been required to find in its approval of the indictment, the State's failure to present this issue to them undermines the constitutional protection found in the grand jury process. In essence, the State's mistake prevented the grand jury from finding whether the higher burden

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[14] *Keller v. State*, 425 A.2d 152, 155 (Del. 1981) (The method within the indictment used to determine the value of property stolen was a material allegation which the state must prove. Amending the indictment to correct the erroneous method was therefore improper.)

[15] *See Upshur v. State*, 420 A.2d 165, 168 (Del. 1980) (While the statutes do not include a *mens rea*, both infer that a knowingly, intentionally or recklessly *mens rea* is an element of the crime.); *See also, Robinson*, 600 A.2d at 359; *Jean v. State*, 538 A.2d 1113 (Del. 1988) (it was harmless error to omit the *mens rea* of "knowingly" within an indictment charging a defendant of maintaining a dwelling for purposes of illicit drug activity.); *Malloy v. State*, 462 A.2d 1088 (Del. 1983) (the indictment effectively placed the defendant on notice of the *mens rea* "intent," since the name of the offense included the word "intent.")

of proof had been established. The Court is satisfied that it neither overlooked nor misapplied legal principles or facts in ruling that the indictment was defective and that an amendment at such a late juncture would be prejudicial to the Defendants. As such, the State's motion is denied.

In making this ruling, the Court has not addressed whether the State has a basis to reindict the Defendants correctly or the applicability of the double jeopardy clause if that occurs. This is a decision for the State to make after its review of the appropriate case law.

Conclusion

For the reasons set forth above, the State's Motion for Reargument is hereby denied.

IT IS SO ORDERED this 30th day of January 2007.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

WCCjr:cjr

cc: Prothonotary's Office